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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 197

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CROMPTON-HIGHLAND MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 124–126) is reported at 167 F. 2d 662. The findings of fact, conclusions of law, and order of the Board (R. 59–106) are reported at 70 N. L. R. B. 206.

JURISDICTION

The judgment of the court below was entered on May 5, 1948 (R. 127). The petition for a writ of certiorari was filed on August 4, 1948, and was granted on October 11, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

QUESTIONS PRESENTED

1. Whether an impasse in bargaining negotiations between an employer and the statutory representative of the employees justifies the employer in subsequently increasing the employees' rates of pay, without consultation or bargaining with the Union, in an amount greatly in excess of that proposed by the employer during the bargaining negotiations which had terminated a short time previously.

2. Whether an employer's subsequent compliance with an order of the Board justifies a court of appeals in refusing to enforce the Board's order.

3. Whether, as a basis for denying enforcement of an order of the Board, a reviewing court may properly rely upon disputable assertions of fact as to compliance made by the employer, not contained in the record certified to the court by the Board and upon which the Board's order is founded, and without remand to the Board for its initial determination of the facts and its administrative judgment of their consequences.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act and its amendments are set forth in the Appendix, *infra*, pp. 55–59.

STATEMENT

Upon a second amended charge (R. 14–15), duly filed by the Textile Workers Union of America, C. I. O., hereinafter called the Union,

the Board on January 31, 1946 issued its complaint alleging, among other things, that Crompton-Highland Mills, Inc., hereinafter called the employer, had since August 31, 1945, refused to bargain collectively in good faith with the Union as the exclusive representative of all the employees in an appropriate unit with respect to rates of pay and wages, and on January 1, 1945, failed to bargain collectively by unilaterally granting wage increases to such employees (R. 12, 10–14). The employer filed an answer denying the allegations and setting forth affirmative matter in defense (R. 24–27, 23). A hearing upon the complaint was held before a trial examiner of the Board on February 20 and 21, 1946 (R. 70). On March 25, 1946, the trial examiner issued his intermediate report (R. 69–104). On August 21, 1946, the Board issued its decision and order (R. 59–64), which it amended on August 26, 1946 (R. 110–111), and corrected on September 5, 1946 (R. 112–113). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

I

THE BOARD'S FINDINGS OF FACT

In the conduct of its business of manufacturing, selling and distributing cotton cloth (R. 71;

[1] In the following statement record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

10, 24), the employer engages about 630 production and maintenance workers (B. A. 41), about one third of whom are paid in accordance with an incentive wage plan, and the remainder of whom are paid on the basis of a straight, hourly wage rate (R. 74; B. A. 51, 14, 20, 22, 15, 30, 157). On August 13, 1945, following an election conducted under Board auspices at which a majority of the production and maintenance employees voted in favor of representation by the Union, the Board certified the Union as the exclusive bargaining representative of the production and maintenance employees who comprise an appropriate unit (R. 72–73, 100; 11–12, 24, B. A. 27–29). The Union appointed a negotiating committee composed of nine or ten members, two of whom, Kenneth Douty and Clara Kanun, were not employed at the plant but were respectively Georgia state director of the Union and field representative of the Union (R. 81, n. 12, 88, 96; B. A. 35, 43–44, 2, 102, 104).[2] Kanun handled the "wage end of the negotiations" on behalf of the Union (B. A. 2).

Ensuing negotiations between the Union and the employer were conducted on August 31, September 12 to 14 and 26 to 28, October 17 to 18,

[2] The Union's method of negotiation, of which the employer was aware, required that an agreement reached between the negotiating committee and the employer meet the minimum standards set by the national office of the Union and also be submitted to and approved by "the local body of people to whom it applies" before final adoption (B. A. 36).

November 7 to 8, and December 19, in 1945 (R. 76, 77; B. A. 32, 36–37). At the outset of negotiations, the Union submitted a proposed contract to the employer which included a request for a general wage increase (R. 76; B. A. 29, 136–149, 3). In addition to the establishment of a minimum hourly wage rate of sixty-five cents, the contract proposed that a "properly balanced and aligned wage structure" "based on the key occupational wage rates established as guide posts" in the February 20, 1945 directive order[3] of the National War Labor Board be negotiated, and that, upon the completion of negotiations and approval of the rate structure, a general increase of ten cents per hour to all employees be granted (R. 76; B. A. 29, 145–146, 3).[4]

At the October 18 meeting, when the Union and the employer "really got into a discussion of the issue" (B. A. 34), the employer rejected

[3] *In re Twenty-Three Southern Cotton Textile Companies*, 21 War Labor Reports 793. The original order set guide rates for only five occupational classifications in the southern textile industry. A subsequent wage formula issued by the Southern Textile Commission, on August 25, 1945, fixed guide rates for thirty-eight classifications (26 War Labor Reports XXIX). These guide rates were hourly wage rates designed to afford a basis upon which unions and employers could negotiate wage adjustments. The record here shows that the parties referred to these rates during their negotiations (B. A. 79).

[4] In requesting hourly wage increases for all employees, the Union during negotiations made clear that it did not object to the increase for incentive-rated employees being achieved by adjustments in the operation of the incentive

the Union's wage proposal in all respects (R. 88; B. A. 14, 62–63). Disclaiming inability to pay as the reason for its rejection (B. A. 34), the employer resisted the wage request upon the asserted ground that its wage scale was presently higher than the prevailing rate in the locality and industry (R. 90; B. A. 6, 16, 17, 37, 54–55, 74). It averred that the average hourly earnings of the employees were already in excess of the War Labor Board guide rates (B. A. 16, 55, 65–66). In professing to find the wage demand unjustified, the employer protested that "It has always been among the first to make wage increases in the community and it always means to be among the first to make increases in this community if it can" (R. 90; B. A. 74, 6, 16, 17, 37, 54–55). As its single affirmative contribution, the employer presented to the Union a schedule of its current wages, and it was emphatic that this schedule "was simply a statement of our current rates of pay and did not involve any wage increase whatsoever" (R. 78; B. A. 14, 30, 106–108, 62–63, 69).[5]

Having failed to reach agreement upon wages and other issues, the Union deemed recourse to

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wage plan (B. A. 24–25, 29, 145–146, 30, 150–151, 31, 152–153, 154–156, 6, 8–9, 20–21). The increase for the hourly rated employees would of course be a straight-time addition to their wages.

[5] The schedule also contained a description of the hourly-rated, straight-time occupations which the employer planned

strike action necessary, and on October 22, 1945, it notified appropriate state and federal government officials of its intention to strike (R. 87; B. A. 38–39, 5, 15). In the usual course, a United States Conciliation Commissioner interceded in the dispute, and meetings were held at his request in his office on November 7, continued through November 8, in order to resolve differences (R. 87–88; B. A. 39–40, 34, 61). At these meetings, the Union reduced its request for a guaranteed minimum wage from sixty-five cents to sixty cents per hour, and it reduced its request for a general wage increase for all employees from ten cents to five cents per hour; it continued to request that the wage structure be aligned in accordance with the War Labor Board guide rates (B. A. 6, 30, 150–151, 12). Notwithstanding the Union's concessions, the employer refused to grant any wage increase, reiterating in effect that its customary generosity could be relied upon to assure the grant of a wage increase when it deemed appropriate (R. 88, 90, 60; B. A. 6, 16, 17, 37–38, 63, 77, 89).

Thereafter, on November 27, in accordance with the War Labor Disputes Act,[6] a strike ballot was conducted at which the employees

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shortly to convert to incentive-rated jobs (B. A. 30, 106–108). Apart from minor exceptions, the employer plans eventually to extend its incentive wage plan to embrace all its employees (R. 74; B. A. 50–51, 66–67, 19, 121, 129).

[6] 57 Stat. 163, 167; 50 U. S. C. App. 1501, 1508.

authorized strike action by a vote of 369 to 120 (R. 87; B. A. 40, 5). "Immediately after the strike vote," the membership of the Union "voted unanimously to place further action" in the "hands" of the negotiating committee which was instructed "to meet again" with the employer "in a final effort to reach a settlement before actually taking strike action" (B. A. 5, 38, 163, 64). Accordingly, the last of the series of meetings was held on December 19, at the Union's behest (R. 88; B. A. 5, 38, 163, 64), at which time the Union presented to the employer "a recapitulation of [its] proposal of November 8 and put down in one place what amounted to about [its] total position on the wage question" (R. 91; B. A. 32, 31, 152–153). At this time, as its first and only counterproposal, the employer offered to insert into the incentive wage plan the ten cents per hour which the incentive-rated employees were presently receiving as a straight-time supplement to their wages.[7] By operation of the incentive wage plan, this offer would amount to an increase of one to one and a half cents per hour for the

[7] At the inception of bargaining between the Union and the employer, incentive-rated employees were receiving, in addition to their incentive computed wages, an extra straight-time ten cents per hour. This supplemental wage, referred to as the "floating dime," comprised two wage increases of five cents per hour each, approved by the War Labor Board, which could not be incorporated into the incentive wage plan because of then existing war regulations governing wage increases. (R. 78–79; B. A. 7–8, 18–19, 34, 56–57.)

incentive-rated employees, about one-third of the working force. (R. 60, 88; B. A. 8–9, 18–19, 34, 39, 64, 72, 98, 99.) Because "it did not begin to meet the increase requested by the Union and did not reflect needed conditions in the mill," the Union rejected this proposal (R. 60–61; B. A. 8).

On January 1, 1946, within twelve days of its refusal to consider during negotiations the grant of any wage raise beyond that contained in its limited offer, the employer announced a concededly "unilaterally determined" increase. The increase thus granted varied from the Union's proposal somewhat because of its inapplicability to certain employees in the unit and the fluctuations in amounts granted but substantially equalled the cost to the employer of the increase requested by the Union and greatly exceeded both in amount and scope of coverage anything which the employer had theretofore offered to the Union. (R. 61, 88–89; B. A. 105, R. 26–27, B. A. 11, 21–22, 33–34, 43–49, 74, 88, 92–95, 98–99, 100, 22, 130–135.)

Professedly actuated by a "rumor, more or less through the grapevine, that local mills were planning to make wage adjustments," which had come to the employer's attention toward the latter part of the week ending December 29, 1945, the employer asserted that it "checked" and "found that wage adjustments were going to be made" at unascertained dates and in unascertained amounts, and it forthwith decided to grant a

wage increase effective December 31, 1945 (R. 88–90; B. A. 92, 74–75, 94–95). Within the space of an hour on the afternoon of January 1, 1946, without prior notice, the employer summoned to its office the rank and file members of the Union's negotiating committee, but omitted to request the presence of the two Union officials who were chiefly responsible for the conduct of the negotiations on behalf of the committee, namely, Kanun, the Union's wage expert, and Douty, the state director of the Union (R. 88; B. A. 88, 43–44, 46, 93, 2, 32). At the same time that the committee's rank and file members were assembled in the office, the employer caused notices of the wage increase to be posted throughout the plant (R. 89; B. A. 49, 44–45, 46–47, 48–49). The introductory clause of the posted notices, read by the employer to the rank and file committee members during their ensuing ten minute audience, stated (R. 89; 44, 47–48, 22, 131–135):

> In accordance with our past policy of being among the first to make wage adjustments when wage changes are being made in this locality, we take pleasure in announcing an increase in rates effective as of the starting of operations Monday morning, December 31st, 1945.

The employer also read to the committee a letter later mailed to Kenneth Douty, the Union's Georgia state director, one of the two Union officials re-

sponsible for steering the committee's work (R. 88–89; B. A. 44, 33, 22, 130). This letter stated:

> In the course of our extended contract negotiations we have repeatedly told you that our mill would be among the first to make wage adjustments in this locality. We have learned that certain of the mills in this locality are about to adjust their wage rates and we are, therefore, making comparable adjustments in our wage rates effective Monday, December 31st, 1945. A copy of the notice which has been posted in the mill today outlining the various rate adjustments is attached hereto.

Upon the completion of the announcement of the unilateral wage increase, the brief session with the members of the committee was ended, and the employer's representative later frankly testified that "the wage adjustment would have been made" notwithstanding "their objections" had they voiced any (R. 89; B. A. 94, 105).

The wage increase covered all production and maintenance employees with the exception of "scrubbers, sweepers and outside labor" (R. 88–89 and note 19; B. A. 100, 22, 131–134).[5] It

[5] Shortly after the announcement of the wage increase, a sweeper who had received no increase complained to one of the members of the negotiating committee; "he wanted to know how come they didn't get a raise, and he said his flour cost him just as much a sack as mine did" (B. A. 47). The scrubbers, sweepers and outside labor are included in the appropriate unit fixed by the Board (R. 89, n. 19).

amounted to an increase of from four to five cents per hour for straight-time, hourly-rated employees and an increase of from five to six cents per hour for incentive-rated employees (R. 88; B. A. 22, 131–135, 98–100).

At the conclusion of the last bargaining conference on December 19, apart from wages, the Union and the employer were in disagreement upon work assignments under the incentive wage plan, insurance provisions, severance pay, vacations, arbitration, union activity upon company time, the preamble to the contract, and union security (R. 88; B. A. 77–78, 40–41). As to union security, the employer's witnesses testified that Kenneth Douty, the Union's chief negotiator, had throughout the latter meetings maintained the position "that we might as well quit talking about a contract because he would never sign any contract, nor ever agree to any contract, irrespective of any other provisions of the contract, unless it included provisions satisfactory to him for the security and protection of the union and the collection of the Union's dues" (R. 90; B. A. 63, 64, 60, 82–83, 91–92, 93–94).

The Board found, however, that the Union did not foreclose agreement by unyielding insistence upon union security (R. 90–91, 60–61). Douty and five other members of the negotiating committee squarely denied that the Union had at any time during negotiations made union security the indis-

pensable precondition to agreement (R. 90–91; B. A. 80–81, 100–105). Douty testified (B. A. 80): "Now we at no time stated that if we didn't get this particular element of the contract that we would have no contract at all. As far as we were concerned, the matter was open for bargaining all along the way on the issues we hadn't arrived at." In its proposed contract submitted to the employer as a basis upon which to initiate negotiations, the Union had included a request for a union shop and check-off of dues and initiation fees (R. 76; B. A. 29, 144). But during the course of negotiations the Union progressively reduced its opening demand in successive stages from a request for a union shop to a provision for maintenance of membership, and at one point indicated a willingness to abandon all compulsory union security and to settle for the deduction of union dues upon the individual authorization of employees (R. 88; B. A. 80, 78–79, 76).[9] The employer, however, refused to grant any form of union security (R. 88; B. A. 72–74, 78–79, 55, 89, 90).[10]

[9] The Union also offered to provide the employer with clerical assistance in the deduction of dues (B. A. 73).

[10] The employer's single counter-proposal along these lines, relating to a form of check-off, was its offer to "give the employees on the first pay day of each month two checks, one for whatever the amount of the Union dues * * *, and the other for the balance of their wages," and to provide a "box" into which the employees might "drop" the dues check

II

THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the employer, "in violation of Section 8 (1) and (5) of the Act, failed to bargain collectively with the Union as the statutory representative of the * * * employees * * * by granting a wage increase to its employees without consulting the Union" (R. 60). It pointed out that by its conduct the employer failed to afford "the Union an opportunity to negotiate with respect to the amount of the increase, the employees to whom the increase would be applicable, the effective date of the increase or any of the factors normally envisaged in the collective bargaining process" (R. 89). The Board also found that "such action taken as soon after the Union was attempting through the bargaining process to reach an agreement with the [employer], among other things, on wages, clearly shows that the [employer] was not acting in good faith during the negotiations, and is manifestly inconsistent

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should they choose to endorse it to the Union (B. A. 73, 90). Further, treating union security as an isolable subject matter of bargaining, the employer refused, in lieu of union security, to consider compensating for its relinquishment by offering more favorable terms upon other aspects of the employment bargain (B. A. 72–73, 86). Thus, the employer's treatment of the Union's security requests paralleled in its lack of compromise its treatment of the Union's wage requests, and as to each, the employer conceded, "We were adamant on both positions" (B. A. 73).

with the principle of collective bargaining" (R. 61).

The Board rejected the employer's "attempted justification for its action on the ground that the Union broke off negotiations on December 19 and that the [employer] was therefore relieved of the obligation to deal with it" (R. 113, 61). The Board stated that even if the Union and the employer "had reached an impasse in their negotiations, this obviously could not affect the Union's status as majority representative," and its consequent continuing "right to bargain with respect to such increase" (R. 91–92), which the employer concededly had "never proposed to the Union as a possible basis of agreement" (R. 113, 61).

Moreover, the factual basis upon which the employer premised the existence of an impasse was found by the Board to be unsupported. The employer contended that the Union's insistence upon union security precluded agreement upon a contract (B. A. 93–94). The Board found that "the preponderance of the credible evidence does not support the [employer's] position that the Union had, in effect, presented an ultimatum that no contract would be consummated which did not afford union security" (R. 90–91), and that "the record fails to support the [employer's] contention that the Union's representatives assumed an unequivocal position at the last meeting which foreclosed further bargaining concerning wages.

or other terms or conditions of employment" (R. 61).

Finally, the Board ruled that neither anticipated wage increases by the employer's competitors in the labor market, nor the Union's taking of a strike vote, absolved the employer of its continuing duty to deal with the Union (R. 89–90, 92).

The Board entered an order requiring the employer to cease and desist from refusing to bargain with the Union "by taking action without prior consultation with said organization, with respect to rates of pay, wages, hours of employment" and "in any other manner interfering with the efforts" of the Union to bargain; upon request, to bargain with the Union; and to post appropriate notices (R. 62–64).

III

THE PROCEEDING IN THE COURT BELOW

On December 8, 1947, the Board filed in the court below a petition to enforce the Board's order (R. 1–5). In its answer to the Board's petition, dated January 10, 1948, the employer alleged (R. 121):

> that since the hearing before the Trial Examiner and the issuance of the order sought to be enforced, [the employer] has bargained with the Union with respect to two general increases in wages and has reached tentative agreements with the

> Union with respect to all proposed provisions of a collective bargaining contract except the provisions, demanded by the Union, with respect to the security of the Union and the deduction of the Union's dues from the wages of the employees; and that on September 19, 1946, [the employer] offered to sign the contract which had been tentatively agreed upon in collective bargaining, and that the Union refused to sign said contract solely because [the employer] would not contract to protect the Union against the anticipated unwillingness of the employees to maintain membership in and pay dues to the Union.

In its brief to the court below (p. 49), the employer further averred that it "has fully complied with said Order, and that said Order has fully served its intended purposes and is now stale."

On May 5, 1948, the court below issued its opinion (R. 124–126), and on the same day entered its judgment (R. 127), in which it denied the petition of the Board for enforcement of its order. The full discussion in the court's opinion states briefly (R. 125–126):

> * * * the only unfair labor practice found by the Board was the granting of a wage increase [by the employer] to its employees without consulting the Union.
>
> It appears, however, to be undisputed in the evidence of Mr. Douty, the representative of the Union in the State, that when

> the wage increase was granted collective bargaining had broken down, the Union had withdrawn from further bargaining in connection with the matter, and a strike vote had already been called. The evidence also seems to be without dispute that the raise in wages was made by the [employer] to meet competition by other mills in that section. Under these circumstances it does not appear to be an unfair labor practice to grant a genera increase in wages to the employees without consulting the Union. On the strength of this view, and in the light of the earnest assertions by the [employer] that it has complied with the Board's previous order and has subsequently bargained with the Union in relation to two general increases in wages, the petition of the Board for enforcement of the order will be denied.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an impasse in bargaining negotiations between the employer and the statutory representative authorizes the employer to institute unilateral changes in rates of pay, different from and in excess of those proposed by it to the statutory representative during negotiations.

2. In holding that the taking of a strike vote by the statutory representative authorizes the employer to effectuate unilateral changes in rates of pay.

3. In holding that anticipated wage increases by competitors of the employer in the labor market authorizes the employer to effectuate unilateral changes in rates of pay.

4. In failing to accept the Board's findings that the employer had not bargained in good faith.

5. In relying upon compliance by the employer with the order of the Board as a reason for denying enforcement of the order.

6. In relying upon disputable assertions of fact made by the employer, not contained in the record certified to the court by the Board and upon which the Board's order is founded, as a basis for denying enforcement of the Board's order.

7. In failing to enforce the order of the Board.

SUMMARY OF ARGUMENT

I

The duty to bargain collectively defined by Section 8 (1) and (5) of the National Labor Relations Act precludes the employer from unilaterally instituting changes in employment terms without affording the statutory representative a prior opportunity to bargain upon the matters. The Board found that the employer, in violation of this duty, unilaterally granted an increase in wages of four to six cents an hour to most of its employees, an amount substantially equivalent in cost to the employer to the increase requested by the Union and denied by the employer twelve days earlier,

notwithstanding the fact that during negotiations the employer limited its offer to an increase ranging from one to one and a half cents per hour for one-third of the working force, a raise markedly less in amount and coverage than that unilaterally made. Thereby the employer contravened the principle proscribing "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees." *May Department Stores Co. v. National Labor Relations Board,* 326 U. S. 376, 384.

After an employer and the exclusive bargaining representative have in good faith bargained to an impasse upon wages or other terms of employment, the employer may unilaterally institute those changes which the statutory representative after notification and consultation found unacceptable. Conversely, however, an impasse in negotiations does not condone the institution of unilateral changes different from or in excess of those which through submission to the collective bargaining process have been tested and proven by genuine bargaining to be an inadequate basis for mutual accord. A genuine impasse reflects the futility and condones the discontinuance of further bargaining so long as the circumstances impelling the deadlock remain unchanged, but when the circumstances which induced the impasse have materially changed, the basis for the

impasse ceases to exist and unilateral action in reliance upon it is no longer justified. Where, as here, after an impasse, an employer by his action changes the status of the negotiations, it becomes the employer's affirmative duty to submit any new wage offer it desires to make to the statutory representative for negotiation.

The Board rejected as factually unsupported the employer's contention that its unilateral action upon wages was justified because of the Union's purported unequivocal position that it would not consent to any agreement, whatever its terms, which did not contain a provision for union security, a matter to which the employer would not accede. Assuming the employer's factual premise, its legal conclusion does not follow. Although the optimum end of collective bargaining is a written agreement covering all aspects of the employment relation, the collective bargaining obligation embraces the duty to bargain "in respect to rates of pay, wages, hours of employment, or other conditions of employment" (Section 9 (a) of the Act), and the inability to agree upon one of these severable items does not abrogate the duty to bargain with respect to other of the items.

The Union's taking of a strike vote does not condone unilateral employer action. Actual recourse to strike action does not relieve the employer of its continuing duty to deal with the

statutory representative, much less an unmaterialized plan to strike. On the contrary, the period preceding a strike is one during which intensified efforts to explore the potentialities for accord through collective bargaining must be exhausted in order to accomplish the Act's purpose to avoid or mitigate needless industrial strife.

Nor is the employer's unilateral action upon wages justified by the purported need to meet the wage increases of competing mills. There is no reason to believe that consultation with the Union upon the wage raise would have caused undue delay; if it did, the interest of the employer and the employees could have been protected by a joint statement of the employer and the Union that any increase ultimately adopted would be granted retroactively.

The Board found, as an alternative ground for decision, that the employer had not been bargaining in good faith during the negotiations. It "seems too plain for anything but statement" that an employer may not stultify the collective bargaining process by its failure to negotiate in good faith, and then "profit from a stubborn refusal to abide by the law" (*Franks Brothers Company* v. *National Labor Relations Board*, 321 U. S. 702, 705) by instituting unilateral changes in employment relations in reliance upon a resultant impasse.

II

Compliance with an order of the Board is not a ground for denying its enforcement. An "order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. Furthermore, the introduction of compliance questions as litigable issues in enforcement proceedings would result in an endless cycle of litigation and impair the workability of the Act. Congress explicitly sought to avoid a requirement that the Board "show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order." H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5.

III

Assuming compliance with the Board's order to be generally material to its enforcement, the danger of accepting the employer's unilateral assertions as to its compliance, without any supporting evidence, is too plain to be belabored. Moreover, the court below by basing its decision on matters outside the record failed to follow the holding of this Court that "The statute expressly deprives the reviewing court of power to consider

facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in § 10 (e) of the Act." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250. Failure to remand to the Board to ascertain the facts effectively defeats the statutory objective of reposing the fact-finding function in the Board and of according finality to its conclusions within the scope of permissible review. Furthermore, failure to remand, assuming the general materiality of compliance, substitutes the reviewing court's discretion for that of the Board in determining to what extent compliance without more is a sufficiently extenuating factor in the special circumstances of a particular case to obviate the need for an enforcement decree.

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT THE EMPLOYER, IN VIOLATION OF SECTION 8 (1) AND (5) OF THE ACT, FAILED TO BARGAIN COLLECTIVELY WITH THE STATUTORY REPRESENTATIVE BY GRANTING A UNILATERALLY DETERMINED WAGE INCREASE TO ITS EMPLOYEES

Section 7 of the National Labor Relations Act guarantees to employees "the right to self-organization, * * * to bargain collectively through representatives of their own choosing * * *."

Section 9 (a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." Implementing Section 9 (a), Section 8 (5) of the Act requires employers to bargain collectively with the representative of their employees. Section 8 (1) of the Act, in generic terms, forbids interference by employers with the rights guaranteed to employees in Section 7.[11]

[11] In the respects stated, the Act is unchanged by the amendments to it. See the comparison of the original Act with the amended Act set forth in 2 Legislative History of the Labor Management Relations Act, 1947 (Gov't. Print. Off., 1948), pp. 1661-1662, 1666, 1667, 1669. Further emphasizing the concept of collective bargaining as basic to the national labor policy, Section 201 (a) of Title II, Labor Management Relations Act, in establishing conciliation procedures for the settlement of labor disputes, states it to be "the policy of the United States that sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining * * *." See also, 93 Cong. Record 3834, 4194, 4361, 4446, 4480, 4675, 7536-7537; H. Rep. No. 245, 80th Cong., 1st Sess., 34, 22, 23. To afford mutuality of bargaining obligation, Section 8 (b) (3) of the Act, as amended, imposes upon labor organizations the reciprocal duty of bargaining collectively with employers. *Matter of National Maritime Union,*

The duty thus required of employers to bargain collectively with the statutory representative removes complete employer dominion over the employment relationship by assuring effective employee participation in making, changing, and

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78 N. L. R. B., No. 137, 22 L. R. R. M. 1289, 1296–1297. Section 8 (d) of the Act, as amended, apart from the proviso, defines the duty "to bargain collectively" as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." This provision represents in essence legislative confirmation of the standard of good faith bargaining as administratively evolved and judicially approved prior to the Act's amendment. *Matter of National Maritime Union*, 78 N. L. R. B., No. 137, 22 L. R. R. M. 1289, 1296; Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 282 (1948); Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, Proceedings of New York University First Annual Conference on Labor, 1948, 257, 258; Note, 61 Harv. L. Rev. 1224, 1225, n. 5 (1948). For representative earlier cases embodying this standard, see *Matter of Harriman Hosiery Mills*, 1 N. L. R. B. 68; *Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35, 36; *Matter of St. Joseph Stock Yards Co.*, 2 N. L. R. B. 39; *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C. C. A. 5); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 523–526; *National Labor Relations Board* v. *Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 459–460 (C. C. A. 7), certiorari denied, 317 U. S. 650.

carrying out the governing terms of employment.[12] By authorizing an exclusive bargaining representative to act on their behalf, the employees through their statutory representative during its incumbency acquire a continuing right to share at every stage with their employer in arriving at the decisions affecting their wages, hours, and working conditions.[13]

To achieve its end of affording to employees the benefits of employment standards "which reflect the strength and bargaining power and serve the welfare of the group,"[14] the collective bargaining obligation not only precludes plural negotiation,[15] but also bars the employer from unilaterally instituting changes in conditions of employment without extending to the statutory representative a prior opportunity to bargain upon the matters. In *May Department Stores Co.*

[12] See *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 638 (C. C. A. 4); Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. Rev. 556, 561–564 (1945); Cox, *Some Aspects Of The Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 275–277 (1948); Cushman, *The Duration of Certifications By The National Labor Relations Board and The Doctrine Of Administrative Stability*, 45 Mich. L. Rev. 1, 21–22 (1946).

[13] See *National Labor Relations Board* v. *Newark Morning Ledger Company*, 120 F. 2d 262, 267 (C. C. A. 3), certiorari denied, 314 U. S. 693.

[14] *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332, 338.

[15] *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U. S. 678, 683–685.

v. *National Labor Relations Board*, 326 U. S. 376, this Court held that an employer committed an unfair labor practice when it unilaterally, without consulting the bargaining agent, requested permission from the National War Labor Board to increase wages. There this Court stated (326 U. S. at 384–385):

> Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. * * *
>
> * * * Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

In disregard of this principle, the decision of the court below permits the employer unilaterally to grant an increase of four to six cents an hour to most of its employees, an amount substantially equivalent in cost to the employer to the increase requested by the Union and denied by the employer twelve days earlier, notwithstanding the fact that during negotiations the employer limited its offer of an increase to one and one half cents per hour for one third of the working force, a raise markedly less in amount and coverage from that unilaterally made. The crux of the decision

below, therefore, is to sanction a unilateral wage increase in excess of the wage offer submitted by the employer to the Union during negotiations.

Not only did the employer deny the Union the opportunity for bilateral settlement of the wage question on an over-all basis which the Union's earlier position showed would be generally satisfactory to it, the employer also prevented the Union from bargaining upon the distribution of the gross increase among the employees. Specifically, the Union was foreclosed from bargaining for a share of the increase on behalf of the unskilled scrubbers, sweepers, and outside labor, who were given no raise, and in contrast to the Union's request that the increase be an equal five cents per hour for all employees, the employer gave a staggered increase ranging from four to six cents per hour depending upon the job classification (*supra,* pp. 11–12 and n. 8).

Because the wage increase unilaterally made had never been proferred by the employer to the Union for acceptance, rejection, or modification through the collective bargaining process, it stands as an alteration of employment conditions effectuated without antecedent bargaining in relation to it. In consequence, the employer's conduct contravenes the principle expressed by this Court in the *May Department Stores* case proscribing "Employer action to bring about changes in wage scales without consultation and nego-

tiation with the certified representative of its employees." [16]

The court below relies for its contrary conclusion upon the ground that "when the wage increase was granted collective bargaining had broken down, the Union had withdrawn from further bargaining in connection with the matter, and a strike vote had already been called" (R. 125). The error of the court lies in its misconception of the circumstances countenancing unilateral conduct. After an employer and the exclusive bargaining representative have bargained to an impasse in good faith upon wages or other terms of employment, the employer may unilaterally institute those changes which the statutory representative after notification and consultation found unacceptable.[17] The collective

[16] For a collection of the other cases and economic authorities for the proposition that a unilateral wage increase made without prior bargaining with the representative of the employees is inconsistent with collective bargaining, see the Brief for the National Labor Relations Board in the *May Department Stores* case, No. 39, October Term, 1945, pp. 20–35.

[17] *Matter of W. W. Cross and Company*, 77 N. L. R. B., No. 188, 22 L. R. R. M. 1131 (where the union effectively demonstrates to the employer that there is no possibility of reaching an agreement on wages through the normal process of collective bargaining in the event that the employer is unwilling to grant the union's wage demands in full, the employer may unilaterally grant the lesser increase to which it is willing to accede); *Matter of Exposition Cotton Mills Company*, 76 N. L. R. B., No. 183, 21 L. R. R. M. 1319 (announcement by employer of an eight cent increase after its

bargaining obligation does not require congealment of the employment structure if the employer and the exclusive bargaining representative cannot after good faith negotiation strike a bargain.[18] Conversely, it necessarily excludes, if it is to retain its force, the institution of unilateral changes different from or in excess of those which through submission to the collective bargaining process have been tested and proven by genuine negotiation to be an inadequate basis for mutual accord.

In the circumstances of this case, the employer's grant of the same wage increase, one and one-half cents to one-third of the working force, offered to and found unacceptable by the Union after negotiation, would have constituted permissible unilateral conduct. But where, as here, the wage increase granted was in excess of that offered to the Union and omitted from its coverage employees on whose behalf the Union was attempting to bargain, the impasse in negotiations did not condone unilateral action beyond that upon which negotiations had deadlocked. As to such a new proposal, the situation is the same as if there had been no bargaining. An impasse cannot be presumed to continue as a barrier to

rejection by the union); *Matter of Southern Prison Company*, 46 N. L. R. B. 1268, 1269 (grant of individual wage increases after the union refused to bargain as to individual increases and insisted upon a general increase).

[18] Cf. *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332, 337.

agreement after the conditions which induced it may have been dissipated by the employer's own determination to make a significant change in his position. To be more explicit, if the employer had acceded to the Union's demand for a five cent wage increase, instead of offering much less, the Union might have abandoned its demand for union security.[19] A genuine impasse reflects the

[19] Illustrative is the following extract from the cross-examination by Board counsel of Frank Ethridge, the employer's personnel manager (B. A. 88–90):

"Q. Now, you were in on these negotiations from the first, weren't you?—A. Yes, sir.

* * * * * * *

"Q. * * * you don't know what would have happened if the Company had met the Union's wage proposal, do you, or union security?—A. No, sir. Neither do I know what would have happened if the Union had withdrawn their union-security clause.

"Q. So the only thing that you can testify to is that under the proposals and counter proposals, the Union did not withdraw its demand for union security; is that right?—A. That's right, sir.

* * * * * * *

"Q. And the Union did not withdraw its proposal for higher wages: and the Company did not accept it.—A. That's right, sir.

* * * * * * *

"Q. And several other aspects. And of course you or I or no one else knows what might have been reached in the form of an agreement if somebody had given on some of the points in controversy that they didn't give on, do we?—A. Somebody would have had to have given. We were in a deadlock there.

* * * * * * *

"Q. And if the Company had given on one, you don't know whether the Union might or might not have given on one;

futility and condones the discontinuance of further bargaining so long as the circumstances impelling the deadlock remain unchanged,[20] but when the circumstances which induced the impasse have materially changed, the basis for the impasse ceases to exist and suspension of negotiations and unilateral action in reliance upon it is no longer justified.[21] Accordingly, where, as here, an employer by his action changes the status of the negotiations, it becomes the employer's affirmative duty to reinstitute bargaining and "to submit any wage offer that it desired to make to the certified bargaining representative for negotiation; absent such submission, an impasse with respect thereto could not have been reached."

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or, if the Union had given on one, you can't categorically say you might or might not have given on one.

* * * * * * *

"Q. You couldn't say whether you would or would not.—A. No; I couldn't say that.

* * * * * * *

"Q. You do know they didn't reach an agreement. And like you and I trying to trade for this watch, if we don't agree today, we don't know what we might do tomorrow, do we? If you make a different offer or something of that nature, we might trade tomorrow, mightn't we?—A. That is true. * * *

* * * * * * *

"Q. And you can only judge a situation on what actually occurred, can't you, at that time?—A. Yes, sir."

[20] Cf. *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342–343.

[21] *Matter of Boeing Airplane Co.*, 80 N. L. R. B., No. 88, 23 L. R. R. M. 1107, 1110–1111.

Matter of Craddock-Terry Shoe Corporation, 73 N. L. R. B. 1339, 1342.[22]

In failing to limit the employer's right to act unilaterally after a bargaining impasse to a matter on which the parties had deadlocked, the court below failed to perceive the transitory nature of an impasse and its lack of relation to

[22] The rule in *National Labor Relations Board* v. *Columbian Enameling and Stamping Co., Inc.*, 306 U. S. 292, 297, which the employer invokes, that the Act does not compel the employer "to seek out his employees or request their participation in negotiations for purposes of collective bargaining," has no proper application to a situation where, as here, after negotiations properly instituted by the union have been deadlocked, the employer later determines to change his bargaining position. The inception of a bargaining relationship contemplates a continuing course of dealing in which the initiative devolves upon the union or the employer in accordance with the realistic, not formal, demands of the bargaining situation. As with the bargaining situation in *Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 436 (C. C. A. 7), so here, the employer "was bound to make the next move." It is aptly stated in Chamberlain, *The Nature and Scope of Collective Bargaining*, Quarterly Journal of Economics, Vol. 58, No. 3 (May 1944), 359, 377–378: "Since the element of mutuality requires that each party negotiate with the other before taking any action in any field of joint concern, it follows that direction of the collective bargaining process to particular issues does not rest solely with the union. Rather, the party wishing to alter the terms of relationship is the one obliged to notify the other of its wishes and to propose negotiations. The burden of initiating discussions on particular issues may thus rest with the employer, and this not only in those instances when he is seeking to curtail the union's prerogatives or its members' perquisites, but also when he proposes to extend them. Once joint concern is established, any unilateral action is barred."

the continuance of the Union's status as the exclusive bargaining representative. In *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134 (C. C. A. 4), certiorari denied, 302 U. S. 731, the employer refused to reinstitute negotiations with the union upon its request because efforts to bargain about a month earlier "had resulted in failure and an impasse in the negotiations had been reached" (91 F. 2d, at 139). In the interval, however, "the status of the controversy had undergone considerable change * * *" (*ibid.*). In sustaining the Board's view that the employer had refused to bargain collectively, the Fourth Circuit held in substance that "the statute enjoining collective bargaining would largely fail of its purpose" were "the failure of negotiations to result in agreement in June" deemed to so clearly preclude "the possibility of agreement in July under the changed circumstances then existing" as to warrant discontinuance of further negotiations (91 F. 2d, at 140). In like fashion in the instant case, "the statute enjoining collective bargaining would largely fail of its purpose" if unilateral employer action may be predicated upon an impasse the basis of which may be dispelled by the very circumstance that the employer is presently willing to grant an advantage which it earlier withheld, and which was material in the bargaining situation inducing the deadlock.

Unilateral employer action, like the refusal to reinstitute bargaining, cannot be justified by an impasse which is spent by changed circumstances. The bargaining relationship between the employer and the statutory representative subsists notwithstanding an impasse; it can be dissolved only by the voluntary action of a majority of the employees in changing or abandoning union representation;[23] and so long as it subsists, employer dominion over the employment relationship is displaced by employee participation, through the statutory representative in, fixing the terms upon which labor is to be performed.

The employer urged before the Board and in the court below, that its unilateral action upon wages was justified because of the Union's purported unequivocal position that it would not consent to any agreement, whatever its terms, which did not contain a provision for union security, a matter to which the employer would not accede. Upon this phase of the case there was a square conflict in testimony (*supra*, pp. 12–13) which the Board resolved against the employer (R. 90, 61), holding that the Union had not in fact foreclosed agreement by unbending insistence upon union security. This finding is clearly supported by substantial evidence (R. 90–91; B. A. 80–81, 100–

[23] See *Franks Bros. Company* v. *National Labor Relations Board*, 321 U. S. 702, 705–706.

105) and was not disturbed by the court below.[24] The employer's legal contention in this respect therefore presents no occasion for its consideration by this Court because it is without factual basis.

However, assuming the employer's factual premise, the legal conclusion which it posits does not follow. The Union's adoption of a position after genuine bargaining that some form of union security is indispensable to any agreement does not justify the employer's unilateral alteration of other terms of the employment relationship. Although the desired aim to which the Act is directed is "to compel employers to bargain collectively with their employes to the end that employment contracts binding on both parties should be made,"[25] the collective bargain obligation embraces

[24] The resolution of conflicting testimony is almost exclusively within the Board's province as trier of the fact, and normally presents no occasion for rejection by a reviewing tribunal. *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206, 226; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597; *West Virginia Glass Specialty Co.* v. *National Labor Relations Board*, 134 F. 2d 551, 552 (C. C. A. 4), certiorari denied, 320 U. S. 738; *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C. C. A. 5); *National Labor Relations Board* v. *Bird Machine Co.*, 161 F. 2d 589, 590–591 (C. C. A. 1); *National Labor Relations Board* v. *Auburn Foundry, Inc.*, 119 F. 2d 331, 333 (C. C. A. 7); cf. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395.

[25] *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342. See also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

the duty to bargain "in respect to rates of pay, wages, hours of employment, or other conditions of employment" (Section 9 (a) of the Act), and the inability to agree upon one of these severable items which prevents consummation of a complete contract does not abrogate the duty to bargain with respect to other of the items.[26] It would seriously impair the collective bargaining obligation to conclude that an impasse reached upon one matter justifies unilateral action upon another matter; stating it more concretely, the inability of an employer and a union to agree upon wages does not sanction the employer's unilateral change of hours.

When the optimum end of collective bargaining, a written agreement covering all aspects of

[26] *Matter of Pool Manufacturing Company*, 70 N. L. R. B. 540, 549 (The Act requires an employer to bargain on all matters involving the employees' terms and conditions of employment, and the inability of the parties to agree on the subject of wages and the closed shop does not constitute a defense to a refusal to bargain with respect to other matters which the union requested be considered). See, Note, 61 Harv. L. Rev. 1224, 1231–1232. Compare Section 8 (d) of the Act, as amended (*supra*, pp. 25–26, n. 11), which requires the employer and the labor organization to "confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, * * *." By the juxtaposition of "wages, hours, and other terms and conditions of employment" with "negotiation of an agreement," it is evident that failure in good faith to reach an agreement does not affect the continuing duty to bargain with respect to the severable, individual, substantive subjects of collective bargaining.

the employment relationship, is unattainable because genuine disagreement prevents a complete contract, collective bargaining contemplates the continuance of dealing upon individual subjects as to which the potentiality for accord has not been exhausted. Even in the absence of a complete written contract, the parties may come to an understanding expressed orally or in a less formal writing with respect to some subjects. The elimination of some items of discord by mutual bargaining to that extent achieves the basic purpose of the statute, the peaceful settlement of industrial disputes.

The court below condones the employer's unilateral action in reliance upon the fact that "a strike vote had already been called" (R. 125). The employer concedes that the court below erred upon this branch of the case. Employer's Brief In Opposition To Certiorari, pp. 29–30, 17. The necessary premise of the court below was that the bargaining agent's plan to resort to strike action to enforce its requests lessens its authority as the statutory representative and diminishes the employer's consequent duty to abstain from unilateral conduct. The Act exacts no such toll upon the right to strike. *Actual* recourse to strike action does not sever the employment relationship between the employer and the striking employees,[27] and in consequence does not relieve the

[27] *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344–345.

employer of its continuing duty to negotiate with their statutory representative and to respect its status.[28] *A fortiori,* in the instant case, the statutory representative's unmaterialized plan to strike does not affect its status. On the contrary, the period preceding a strike is one during which intensified efforts to explore the potentialities for accord through collective bargaining must be exhausted in order to accomplish the purpose of the Act to avoid or mitigate needless industrial strife.[29]

The court below parenthetically justifies the employer's unilateral action upon the ground "that the raise in wages was made by the [employer] to meet competition by other mills in that section" (R. 125). Apart from the dispositive fact that necessitous circumstances did not impel the employer's unilateral conduct,[30] the

[28] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885–886 (C. C. A. 1), certiorari denied, 313 U. S. 595; *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 140 (C. C. A. 4), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292.

[29] Compare Section 204 (a) (1) of Title II, Labor Management Relations Act, 1947: "In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions * * *."

[30] The employer did not contend that the information as to upward wage adjustments in competing mills constrained it

decision below ascribes to the collective bargaining process an inflexibility disabling it from accommodating to the need for speed in making wage adjustments when the situation requires expedited action. There is no reason to believe that consultation with the Union as to the granting of this increase would have caused undue delay; if it did, the interest of the employer and the employees could have been protected by a joint statement of the employer and the Union that any increase ultimately adopted would be granted retroactively. In the absence of preliminary resort to the collective bargaining process to test the feasibility of immediate agreement between the statutory representative and the em-

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to effectuate a *unilateral* wage increase. Its position was rather that the Union's insistence upon union security purportedly made resort to collective bargaining futile, and in consequence condoned recourse to unilateral action (*supra*, p. 15). When the employer decided to take unilateral action it did not know either the amount of the increase to be made by competing mills or the time it was to be put in effect (*supra*, pp. 9-10). Therefore, the employer did not know what it had to meet or when it had to meet it to prevent the employees from leaving their jobs, an exodus which the employer had no reason to expect, upon the basis of the information it had, would occur with any immediacy. Moreover, the employer made no showing, and it can hardly be assumed as indisputable, that the local labor market was so fluid, and the employees so mobile, that any significant number of the employer's 630 production and maintenance workers could be absorbed at once by other employers. Finally, it cannot be presumed that the employees would become restive during the period that they know their statutory representative is negotiating a wage increase for them.

ployer, it cannot be assumed that conceivable harm to the employer from the brief delay needed to notify and consult the Union overbalances the harm to the employees arising from disregard of their bargaining representatives.[31]

In addition to the Board's position that an impasse does not justify unilateral employer action in a form in excess of or different from the proposals offered by the employer during the negotiations culminating in the deadlock, the Board found, as an alternative ground for decision, that the employer had not been bargaining in good faith during the negotiations. The Board inferred lack of good faith from the speedy grant of the unilateral wage increase in an amount financially as onerous to the employer as the amount

[31] Even if necessitous circumstances had impelled the employer here, the several courts of appeals have in instances of claimed employer hardship uniformly applied the rule that the Act "prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute." *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Globe Brewing Company*, 144 F. 2d 847 (C. C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. C. A. 7); *National Labor Relations Board* v. *Hudson Motor Car Company*, 128 F. 2d 528, 532–533 (C. C. A. 6); *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557 (C. C. A. 3); *National Labor Relations Board* v. *National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. C. A. 2).

requested by the Union and denied by the employer only twelve days earlier. Without intimating any rejection of this finding as based upon an insupportable inference, the court below failed to give effect to it.

The only possible factor militating against the propriety of the inference is the employer's interim information of upward wage adjustments to be made by competing mills ostensibly affording it a reason to change its wage position. However, the precipitate haste with which the employer seized upon this reason to effectuate a *unilateral* change when it knew neither the amount nor the time of the competing increase (*supra*, pp. 9–10) confirms rather than dispels the inference. The inference to be drawn from the facts is, of course, within the Board's province as trier of the fact. *National Labor Relations Board* v. *Nevada Consolidated Copper Corporation*, 316 U. S. 105; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477–478; *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U. S. 678, 681, n. 1.

It "seems too plain for anything but statement" that an employer may not stultify the collective bargaining process by its failure to negotiate in good faith, and then "profit from a stubborn refusal to abide by the law" (*Franks Brothers Company* v. *National Labor Relations Board*, 321 U. S. 702, 705) by instituting unilateral changes

in employment relations in reliance upon a resultant impasse. *National Labor Relations Board* v. *Hoppes Mfg. Co.*, decided November 29, 1948, slip opinion, pp. 3–4 (C. C. A. 6).

II

ENFORCEMENT OF AN ORDER OF THE BOARD MAY NOT PROPERLY BE DENIED BECAUSE IT HAS BEEN OBEYED

In denying enforcement of the Board's order the court below, without particularization, relied upon "the earnest assertions by the [employer] that it has complied with the Board's previous order and has subsequently bargained with the Union in relation to the two general increases in wages" (R. 126). The employer concedes that the court below erred upon this branch of the case. Employer's Brief In Opposition To Certiorari, pp. 4, 29–30, 23–24, 32.

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, this Court explicitly held that compliance with the Board's order is without relevance to the propriety of its enforcement. There this Court stated that "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." Notwithstanding discon-

tinuance of the proscribed practice through voluntary compliance, the Board is "entitled to bar its resumption" by invoking compulsive judicial power in aid of its order. Compare *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260.

Compliance is irrelevant to the enforcement of a continuing order not only because voluntary obedience does not preclude the danger of resumption of the proscribed practice, but also because the introduction of compliance as a litigable issue in enforcement proceedings would drastically impair the workability of the Act. If each of the elements of compliance was litigated, the time necessarily consumed in their disposition would in the interim produce further changes in the situation affecting compliance to be in turn litigated in an endless cycle which would make "a merry-go-around of the Act." [32]

To permit violators of the Act to defeat enforcement of Board orders by showing compliance would bring about the very evil which Congress sought to avoid in empowering the Board under Section 10 (e) of the Act to petition for enforce-

[32] *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. C. A. 3). Compare the opinion of Mr. Justice Rutledge speaking for the Court of Appeals for the District of Columbia in *International Association of Machinists* v. *National Labor Relations Board*, 110 F. 2d 29, 23 (App. D. C.), affirmed, 311 U. S. 72, 82.

ment of its order. In conference, to obviate the materiality of compliance, the language of Section 10 (e) was deliberately changed from that contained in the original Federal Trade Commission Act (38 Stat. 717, 720) to its present form, and the change was explained as follows (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

> Section 10 (e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commis-

> sion Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

Consequent upon these considerations, the courts of appeals have uniformly held that discontinuance of the proscribed conduct through voluntary compliance with the Board's order is immaterial to its enforcement and have refused to litigate questions of compliance as a condition precedent to entry of an enforcement decree.[33]

[33] Illustrative of the decisions in the Courts of Appeals are the following cases:

First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations Board* v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72–73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v.

Any other conclusion entails seriously detrimental consequences to the Act's enforceability.

III

A REVIEWING COURT MAY NOT RELY UPON DISPUTABLE ASSERTIONS OF FACT AS TO COMPLIANCE MADE BY THE EMPLOYER, NOT CONTAINED IN THE RECORD CERTIFIED TO THE COURT BY THE BOARD AND UPON WHICH THE BOARD'S ORDER IS FOUNDED, AS A BASIS FOR DENYING ENFORCEMENT OF THE BOARD'S ORDER

Assuming compliance with the Board's order to be generally material to its enforcement, the court below erred in accepting as fact the employer's "earnest assertions" with respect to its compliance when no evidence respecting compliance had been offered before either the Board or the court. The employer seemingly concedes that the court below erred upon this branch of

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Gerling Furniture Manufacturing Co., Inc., 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Swift & Company*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250; *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

For prior decisions in the court below in accord with these views, see *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497.

the case. Employer's Brief In Opposition To Certiorari, pp. 4, 24, 32.

The employer's averments as to its compliance are contained in its answer to the Board's petition for enforcement and in its brief in the court below (*supra*, pp. 16–17). They are not part of the record certified by the Board to the court below and upon which the Board's order is based. The danger of accepting such unilateral assertions, unsupported by any evidence, is too plain to be belabored.[34]

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[34] The danger to be apprehended is strikingly illustrated by the following extract from the Union's oral argument before the Board (Transcript of oral argument before the Board, pp. 25–26, 29):

"Mrs. KANUN. * * * since this hearing was held in February there have been some additional occurrences which I think are pertinent to any decision which the Board may make.

"Chairman HERZOG. I don't think we can hear them if they are not in the record, Mrs. Kanun.

"Mrs. KANUN. O. K. I will withdraw them.

"There is one point which I feel I should mention because I should have a right to mention it, because Mr. Williams included it in his brief, and that is a substantive wage increase to the March level. I will abide by any decision you make on it, of course.

"Mr. WILLIAMS. I did mention the fact in our brief that we made another wage increase on March 11.

"Chairman HERZOG. I think if Mrs. Kanun wants to allude to that very briefly it is all right but I don't think she better allude to anything else.

"Mrs. KANUN. * * * The second wage increase which Mr. Williams referred to in his brief was a community movement, although he indicates it was put into effect through the process of collective bargaining, was not actually bargaining in good faith because on March 9, 1946, the Union re-

Even if the employer's assertion of compliance had been supported by proof, the court below would still have erred in considering it since no evidence respecting compliance had been included in the record before the Board. This Court in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250, held that "The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in § 10 (e) of the Act."[35]

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ceived a notice from the Company asking for a meeting on March 12, 1946, to put into effect a wage increase which it wanted to put in effect on March 11, 1946, in addition to which—I don't want to impose upon the tolerance of the Board in dragging in extraneous issues but there were some unfair labor practices in connection with the second wage increase which, if the Board should see fit to change any of the rulings recommended in the intermediate Examiner's report, we would consider a valid basis of filing subsequent cases for unfair labor practices and not bargaining in good faith."

[35] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428, is not opposed to, but confirms the authority of this case. In the *Jones & Laughlin* case, this court stated that, in the consideration of circumstances arising after issuance of the Board's order affecting the propriety of its enforcement, "where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order." Because the subsequently arising facts were stipulated and the Board's policy applicable to them was settled, remand in the *Jones & Laughlin* case was unnecessary, since

Section 10 (e) of the Act, as amended, in substantially the same terms as prior to the amendment, provides that:[36]

> If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

Acceptance by the court below of the employer's bare assertions without remand to the Board to ascertain the facts effectively defeats the statutory

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the failure to remand could in no wise undercut administrative authority. Precisely the contrary is true here, inasmuch as both facts and policy are in question.

[36] For the criteria applicable to remand to adduce additional evidence, see, generally, *Southport Petroleum Company* v. *National Labor Relations Board*, 315 U. S. 100.

objective of reposing the fact-finding function in the Board and of according finality to its conclusions within the scope of permissible review.

Apart from the failure to remand to the Board for the ascertainment of the facts as to compliance, the court below was in equal error in failing to remand to secure the Board's administrative judgment of the consequences of compliance in the special circumstances of the particular case. Assuming *arguendo* the general materiality of compliance status as a condition precedent to obtaining an enforcement decree, each case presents individual problems as to the extent to which compliance makes entry of a decree enforcing the Board order necessary. The benefits of expertness which the Act contemplates will be derived from the creation of a specialized agency especially competent in the field of labor-management relations are not confined to the adjudication of unfair labor practices and the fashioning of an appropriate remedy,[37] but extend as well to the determination of questions of compliance in the execution of the remedy.[38] Recognizing that the administrative process is not exhausted with the issuance of the Board's order, a post-decree compliance procedure has been developed whereby subsequent to the enforcement

[37] *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 194.

[38] *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 270.

of a Board order the cause may in appropriate circumstances be remanded to the Board to make inchoate aspects of the decree more definite and to define compliance requirements in the light of changed circumstances.[39] The court below, therefore, in presuming that compliance without more was a sufficiently extenuating factor in the circumstances of this case upon which to predicate denial of enforcement substituted its discretion for that of the Board on a matter within administrative competence.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision below should be reversed

[39] *Wallace Corporation* v. *National Labor Relations Board*, 159 F. 2d 952 (C. C. A. 4); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949 (C. C. A. 2). See also, *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 298 (C. C. A. 1); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. C. A. 2); *National Labor Relations Board* v. *Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983, 989 (C. C. A. 7); certiorari denied, Supreme Court No. 245, October 18, 1948. Although this procedure has thus far been confined to the computation of back pay and the determination of "substantially equivalent" positions in the reinstatement of discriminatorily discharged employees, the principle upon which it is based is of general application. It is appropriate, for example, to the determination whether the relation of a successor employer to its predecessor is such as to justify holding the successor responsible for the rectification of a continuing course of unfair conduct. See *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9; *Southport Petroleum Company* v. *National Labor Relations Board*, 315 U. S. 100.

and the cause remanded with directions to enforce the Board's order in full.

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DECEMBER 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce

by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * * *

[SEC. 10] (c) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

The relevant provisions of Section 10 (e) of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * * *

* * If either party shall apply to the court for leave to adduce additional ev-

dence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

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